THE LEGALITY OF "TRUSTS."

IN the preceding number of the QUARTERLY certain important aspects of "trusts" were considered.[1] It is the object of this paper to consider solely the question of their legality.

It is important at the outset to state the nature of a "trust." The term is an unfortunate one, since it is in no respect descriptive of the subject at issue. A trust is in general simply the case of one person holding the title of property, whether land or chattels, for the benefit of another, termed a beneficiary. Nothing can be more common or more useful. But the word is now loosely applied to a certain class of commercial agreements and, by reason of a popular and unreasoning dread of their effect, the term itself has become contaminated. This is unfortunate, for it is difficult to find a substitute for it. There may, of course, be illegal trusts; but a trust in and by itself is not illegal: when resorted to for a proper purpose, it has been for centuries enforced by courts of justice, and is, in fact, the creature of a court of equity.

To solve the questions now to be considered, it is necessary to look deeper and to consider the purpose for which the trust is created. The trust is a mere instrument — the means to an end. The real inquiry, accordingly, is whether the *end* sought to be accomplished, through the medium (either wholly or partly) of a trust, is a lawful one.

To reach a correct result upon this point, we must resort to the common law of England, which is adopted in this country, sometimes by constitutional provision and at other times by statute, in each of the states of the Union (except Louisiana) as the basis of its law. True, the common law, as thus adopted, may be changed by state legislation not forbidden by the constitution of the state or by that of the United States. If the

[1] George Gunton, The Economic and Social Aspect of Trusts, POLITICAL SCIENCE QUARTERLY, III, 3 (September, 1888).

conclusion should be arrived at in the course of the discussion that the object for which the so-called trust was created is lawful, a grave question will arise whether under all the circumstances of the case, hostile legislation will be constitutional.

The various matters to be considered may be grouped under the following heads:

I. Is the object sought to be accomplished by a "trust" legal at common law, either (*a*) by agreement of individual producers, not acting as stockholders in corporation, or (*b*) by agreement of stockholders?

II. If the end be legal, how far will it be possible for a state legislature to prohibit it?

III. What is the power of Congress to legislate upon the subject?

I.

At this stage of the discussion, the real inquiry is as to the lawfulness of an act or a contract in restraint of trade. The inquiry assumes two phases. What, in the first place, is its validity as between the parties to it? The other (and at the present time much the most important) inquiry is as to its lawfulness as a matter of public or *criminal* law. This last topic will be considered first in order.

The rules of the early common law upon this point are uncertain and obscure. One reason of the uncertainty is that a very early English statute enumerated various acts of this sort as criminal offences, so that while it remained in force prosecutions could be and were rested upon the statute without any legal inquiry into the rules of the common law. It appears to be the better opinion that acts and contracts in restraint of trade were not criminal offences unless made or committed with intent to injure the public, as for example to raise the price of provisions. The view of the courts will be most readily understood by referring to the statute (5 and 6 Edward VI, cap. 14) passed by Parliament in 1552, and the decisions under it. The preamble to this statute refers to the prevailing uncertainty upon the subject, declaring that existing statutes, so far as they provided

for the subject, were substantially a dead letter. It then proceeded to classify offenders in this direction into three classes, *viz.:* "forestallers," "regrators," and "engrossers." Within these classes, one variety of forestallers was nearer than any other to the cases now under consideration, *viz.:* such persons as were guilty of making any motion by word, letter, message or otherwise to any person or persons for the enhancing of the price or dearer selling of any goods, or "dissuading, moving or stirring any person or persons coming to a market or fair to abstain or forbear to bring or convey any merchandise *etc.*, coming by land or water towards such market to be sold, from being brought or conveyed." Though, as has been said, this case somewhat resembles the object of a "trust," it is by no means identical with it, since a trust for the most part aims to prevent the overproduction of merchandise.

A casual perusal of this statute of Edward VI will show that it was conceived in the most narrow and illiberal spirit. Among other things, it prohibits contracts for the purchase of goods before they arrive at the place of sale. So, for example, one could not purchase food or "dead victual" and sell it again in the same market or within four miles of it without being stigmatized as a regrator, though he was permitted to re-sell living animals fit for food if, after purchasing them, he kept and fed them for five weeks on his own ground. The offence of engrossing consisted in buying large quantities of food *etc.*, with intent to sell again. The most extraordinary clause in the statute is found in the eighth section, providing in substance that any farmer buying grain for seed and having on hand sufficient for the purpose must at the same time bring to the market of his own grain an amount equal to what he buys, and sell it there if he can. We have here, manifestly, a rude attempt to equalize the amount of grain for sale in the market. This rule is enforced by a severe clause of forfeiture. In general, the punishments for violating this absurd statute were sharp and severe: a conviction for a third offence was punished by exposure in the pillory, forfeiture of all goods and commitment to prison during the King's pleasure.

Subsequent legal opinions of text-writers and decisions of courts rest largely upon this statute.

Hawkins, who is a writer of authority, maintains the view that an *endeavor to enhance* the common price of merchandise is a criminal offence by the rules of the common law. He cites little, if any, authority for this statement, and one of his leading instances is that of a rich man engrossing into his hands a whole commodity with an intent to sell it at an unreasonable price, thus making intent a prime ingredient in the offence. He cites an early case (in the time of Charles I) to maintain the proposition that forestalling and kindred acts constitute an offence at common law. The case cited appears upon examination to be framed upon the statute of 5 and 6 Edward VI, already referred to; and although the case was argued it does not appear to have been disposed of by the court.[1] Hawkins then goes on to consider the statute at much length. His whole discussion leaves the impression that there is little, if anything, to be said as to the common law.[2]

A word may be added as to the opinion of Lord Coke. He also expresses the view that forestalling and kindred acts constitute a crime at common law. Most of his references, like the case cited by Hawkins, are to various statutes enacted in the progress of the law. Moreover his distinctions are quite whimsical and unsound, considered from any point of view but that of arbitrary statutory enactment. Thus he confines his view to the case of "victuals," and these must be of necessary and common use. It is no offence, for example, to engross apples, as they are rather of pleasure than of necessity; and the same remark is made of plums, cherries, and other fruit. It is in his view illegal to sell wheat in sheaves before it is threshed and measured, as by such sale the market might be forestalled.[3] It ought to be added that the book of Coke's *Institutes* in which this matter is found (the third) has by no means the high legal credit accorded to his commentaries upon the law of real estate, and is of doubtful authenticity.

[1] King *vs.* Maynard, Croke Charles, 231.

[2] Hawkins, Pleas of the Crown, chap. 80, Lond. ed. 1739.

[3] 3 Coke's Institutes, chap. 89.

It may therefore fairly be said that, when these great legal writers, Coke and Hawkins, left this subject, the law concerning it was in an unsettled and chaotic state, while the legal distinctions asserted were childish and without any sound foundation in the rules of political economy.

The judgment of Chitty, quite a modern writer, is greatly to be preferred. After reviewing the old authorities, he says: "*Quære* whether in all cases it ought not *now* to be averred and proved that the defendant intended to injure the public." He uses the word "now," because the statute of 5 and 6 Edward VI had been repealed, and he was looking at the whole matter from the common-law point of view. Other passages show that his view was that bad intent must be alleged and shown in order to make an indictment hold water.

This subject received extensive judicial consideration at the beginning of this century, long after the time of Coke and Hawkins.[1] The case of Rex *vs.* Waddington was a *common-law* case, the statute of 5 and 6 Edward VI having been repealed.[2] There are, in the volume cited in the note, two cases involving the conduct of Waddington. The charge against him, in substance, was that wickedly *intending to enhance* the price of hops he had, in the presence of hop planters and others, declared that the existing crop of hops was nearly exhausted and that, before the hops then growing could be brought to market, the existing crop would be exhausted, and that his intent was by such reports to induce persons then present and dealers in hops and having large quantities of them for sale to abstain from selling them for a long time, and thereby greatly to enhance the price of hops. Similar acts were set forth in later clauses of the indictment, but the bad intent was alleged in all of them. The great question was then debated whether the facts as stated in the indictment disclosed any common-law offence. One of the questions was whether hops were "victual" or an article of food. The court said that though hops

[1] See the case of Rex *vs.* Waddington, 1 East, 143 (A.D. 1801).

[2] It was repealed by 12 Geo. III, cap. 71 (A.D. 1772). The old rule had been modified by 15 Chas. II, cap. 7.

were at one time deemed poisonous, they had then become one of the necessaries of life and accordingly within the spirit of the law against forestalling, *etc.* The whole discussion turned upon the point whether the price of *food* had been interfered with. It seems to have been conceded that the whole subject of forestalling applied to "victual" only. The court having decided that hops were "victual," then came the question whether the indictment disclosed any common-law offence. On this point the Chief Justice said :

> Here is a person going into the market who deals in a certain commodity. If he went there for the purpose of making his purchases in the fair course of dealing, with a view of afterward dispersing the commodity which he collected in proportion to the wants and convenience of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shows plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on *with a view to enhance* the price of the commodity, to deprive the people of their ordinary subsistence or else to compel them to purchase it at an exorbitant price, who can deny that this is an offence of the greatest magnitude? . . . Now this defendant went into the market for the very purpose of tempting the dealers to raise the price of the article, offering them higher terms than they themselves proposed and urging them to withhold their hops from the market in order to compel the public to pay a higher price. What defence can be made for such conduct, and how is it possible to impute an innocent intention to him? We must judge of a man's motives from his overt acts, and by that rule it cannot be said that the defendant's conduct was fair and honest to the public.[1]

There are further remarks in the opinions of the court showing that in its judgment it had in view the protection of the laboring classes from intentional efforts of speculators to enhance the price of provisions. From this extract it is very plain that the court, speaking through Lord Kenyon, held that the offence of forestalling, *etc.*, applied simply to the necessaries of life ; that hops belonged to that category ; that there must be *a clear intent* on the part of an alleged offender to enhance the price of the article ; and that this intent may be inferred from his acts.

[1] 1 East, 157, 158. Also Rex *vs.* Waddington, 1 *Id.* 167.

It is settled by the highest authority, in a later decision, that the offences of engrossing and regrating were at common law confined to the necessaries of life.[1] We say regrating, but it is very doubtful whether any such offence ever existed independent of the statute of 5 and 6 Edward IV, already cited.[2]

About the time that this old statute was repealed, Adam Smith was lending his powerful aid to weaken its hold upon the public mind. He had compared the laws against forestalling, *etc.*, to those against witchcraft. The passage is quoted here since it produced a great effect on the English public mind. He says:

> The popular dread of engrossing and forestalling may be compared to the popular terrors and suspicions of witchcraft. The unfortunate wretches accused of this latter crime were not more innocent of the misfortunes imputed to them, than those who have been accused of the former. The law which put an end to all prosecutions against witchcraft, which put it out of any man's power to gratify his own malice by accusing his neighbor of this imaginary crime, seems effectually to have put an end to those fears and suspicions, by taking away the great cause which encouraged and supported them. The law which would restore entire freedom to the inland trade of corn, would probably prove as effectual to put an end to the popular fears of engrossing and forestalling.[3]

Lord Kenyon, when he wrote the opinion in Rex *vs.* Waddington already cited, was familiar with Smith's views, and endeavored to draw a line which the court could uphold.

The same general question came up in the case of King *vs.* Webb[4] and others in 1811. Lord Ellenborough, who (as Mr. Law) had argued for the defendant, Waddington, the case al-

[1] Pettamberdass *vs.* Thackoorseydass, 7 Moore P. C. Cases, 239, 263 (A.D. 1850). The judges holding this court were of the very highest ability, including Lord Langdale, Lord Wensleydale and Dr. Lushington. See the remarks of the court on page 263 of the report.

[2] King *vs.* Rusby cited in 2 Chitty, Criminal Law, 527 *et seq.* Also in 2 Blackstone, Comm. (Sharswood's ed.) note 10 to page 158. In this case the members of the court were equally divided, and though the defendant was convicted, no judgment was ever passed upon him.

[3] Smith, Wealth of Nations (Thorold Rogers' ed. 1869) II, 111.

[4] 14 East, 406.

ready cited, was then Chief Justice. The question arose upon an indictment under the terms of the statute of 6 George I, cap. 18, secs. 18 and 19. This act was passed after the notorious South Sea Bubble, and is known as the "Bubble act." It declared the then existing practice of making subscriptions for commercial undertakings *without an act of incorporation*, and making the certificates of subscribers transferable, to be a common nuisance. The facts of the case of King *vs.* Webb were that a subscription had been made in the city of Birmingham towards £20,000 in 20,000 shares, to buy corn, and to grind it into flour and to make it into bread and to deal in it and to distribute it. It appeared that this was done with laudable motives and for the purpose of more regularly supplying the town and the neighborhood with flour and bread, and that this was beneficial to the inhabitants at large. The court said that the acts shown to be done could not be regarded as a nuisance, and judgment was entered for the defendants.

The case of Pratt *vs.* Hutchinson,[1] sheds light on the same general subject. This was an indictment framed upon the same statute of 6 Geo. I, cap. 18. In this case, 50 persons agreed to raise 200 shares at £210 each by small monthly subscriptions for building houses for each other, with a stipulation for the members to employ *certain tradesmen only* in the building, with power to each member to sell his shares and transfer them in the books of the society, provided that the purchaser should be approved at a meeting of the society and should on his admission become a party to the original articles. The court held several propositions. One was that the stock was not in the true sense made transferable, as corporate stock, since the purchaser was to become a party to the original articles. Again, that the contract only to employ particular tradesmen in whom the parties had confidence was not in "restraint of trade" and that it was not illegal for persons to combine not to employ any other than certain specified persons. As Lord Ellenborough expressed it, "the combination must be for some *illegal object*," and there was nothing illegal in stipulating to employ particular per-

[1] 15 East, 511 (A.D. 1812).

sons only in the building of the houses. Finally, it was urged by the prosecution that the clubbing together of numbers of persons with transferable shares, even though transferable only in a limited way, for the purpose of carrying on trade, was calculated to put down individual industry and competition, "which is most advantageous to the public." It was said: "If fifty persons may do this, why may not a thousand?" To this a distinguished member of the court, Bayley J., replied: "That would bring it to a question of fact, for the consideration of the jury, whether the extent of the numbers engaged in such undertakings was not prejudicial in fact to the public." [1]

The case of Pratt *vs.* Hutchinson must certainly be deemed an important authority to the effect that an act which is in itself laudable is not to be regarded as a nuisance simply because it may be stamped as a nuisance by legislative fiat, and that a mere combination of persons to accomplish a lawful end by lawful means is not in a legal sense a conspiracy, as some would strive to make us believe. It serves to meet an objection raised to "trusts," *viz.:* that they are an illegal assumption of corporate power. The certificates issued by trustees of "trusts" to the stockholders of companies surrendering corporate shares closely resemble those discussed in the case of Pratt *vs.* Hutchinson.

The statute just referred to was merely an outcome of an unnecessary fear and has long since been repealed.[2] Its only value now lies in the decisions to which it gave rise. After its repeal the question arose whether such companies as those described in the act are illegal at common law. The main inquiry has been as to the illegality of an organization in the nature of a partnership, without legislative sanction, having transferable stock or shares. Some of the very early cases declared such organizations to be illegal. Lord Eldon led the way in this view, holding [3] that companies with large capitals arising from numerous small contributions and with transferable

[1] 15 East, pp. 516, 517.
[2] See 6 Geo. IV, cap. 91.
[3] Kidder *vs.* Taylor, referred to in Lindley on Partnership, 1st ed. 150.

shares were injurious to the public, and illegal independent of the "Bubble act."[1] Other cases containing similar expressions are cited below.[2] All of these contain special facts constituting or supposed to constitute illegality, so that the question was not fairly reached. In the time of Lord Brougham and later, the question was squarely presented; and henceforward the decisions, though presenting varying phases, are uniform to the effect that a joint-stock company with transferable shares, though unincorporated, is not illegal at common law, unless it can be shown affirmatively to be of a dangerous and mischievous character, tending to the grievance of the people.[3] Mr. Lindley (now Lord Justice of Appeal) in his excellent work on partnership, sums up the whole subject in six propositions, the substance of which is: that it is not illegal for any number of persons to enter into a contract of partnership; nor for them to agree that, when one retires, a person who is not a member of the firm but who is willing to become one shall take his place; nor that the new comer may be selected by the one retiring; nor that the outgoing and incoming partner may agree upon the terms of withdrawal and entrance, if these terms are not in themselves illegal; nor is it illegal for the members of the firm to assume a name, and to agree that the management of its affairs, both internal and external, shall be entrusted to a select few and that those few shall have power to make rules which others shall be bound to obey.[4] It seems extraordinary to business men of our day, to whose minds unincorporated joint-stock companies having transferable shares are almost as familiar a thought as incorporated companies, that within the memory of many men now living these organizations, though free from

[1] 6 Geo. I, cap. 18, secs. 18 and 19, already cited.

[2] Duvergier *vs.* Fellows, 5 Bing. 248; S. C. 10 B. & C. 826; and 1 Cl. and Fin. 39. Blundell *vs.* Winsor, 8 Sim. 60. Duvergier *vs.* Fellows, in the appellate court, was placed on the ground that the association was organized to accomplish *an illegal purpose.*

[3] The decisions serving to establish this point are: Walbam *vs.* Ingilby, 1 M. and K. 61; Garrard *vs.* Hardy, 5 Man. and Gr. 471; Harrison *vs.* Heathorn, 6 *Id.* 81. The rule has been extended to unincorporated companies with shares transferable by delivery. *Ex parte* Barclay, 26 Beav. 177; *Ex parte* Aston, 5 Jurist, N. S. 615.

[4] Lindley on Partnership (1st ed.) p. 153.

all fault and doing a legitimate business, were considered by the highest legal minds to be illegal as a usurpation of corporate powers. The great Lord Eldon is to some extent responsible for the hold obtained by these highly erroneous ideas concerning trade. A prominent legal writer declares that Eldon's horror of forestalling and regrating was derived from what he had heard his grandmother at Newcastle and afterward his tutor at Oxford say, to the effect that thereby "the price of provisions is cruelly enhanced to the poor." When Lord Chancellor, he had to dispose of a bill in equity in which it was alleged by the plaintiffs that they were wholesale grocers; that, according to the usual course of the fruit trade, that article was imported in whole cargoes to a much greater extent than was sufficient for the supply of most of the persons employed in the wholesale trade; and that, in consequence of risk from the perishable nature of the commodity and the heavy duties with the prime cost, a society had been formed many years before and still subsisted by the title of "The Fruit Club," under the management of a select committee of which the defendants were members. The club was instituted for the purpose of making purchases of imported fruits and supplying the general trade, after deducting a reasonable profit to the committee for their trouble. The bill went on to allege that the committee had formed a scheme of getting into their own hands the exclusive possession of the trade and compelling all the wholesale dealers to apply to them for a supply, and recited various acts that they had done, *e.g.:* that they had bought at low prices and resold at high prices, had refused to have further dealings with buyers who had bought of others without first applying to them, and had in these ways obtained control of the market. This had led the plaintiffs to make a purchase of the committee, acting as trustees of the club. The object of the bill was to obtain a discovery, injunction, *etc.* Curiously enough, the committee claimed on behalf of the club that it was illegal and that, according to a familiar rule of law, no bill in equity could be sustained owing to the illegal nature of the transaction. Lord Eldon was very emphatic in denouncing the organization, say-

ing that while these acts did not fall within the legal definition of the term forestalling, much less regrating, still less monopolizing, they contained the mischief of all three; for first, there was a conspiracy against the vendors, and next, *a conspiracy against the world at large* (!) enabling the committee to buy at any price they might think proper. He accordingly declared the transaction illegal.[1]

If all this tirade were good law, it might go hard with modern trusts. But the argument that the members of this "Fruit Club" had entered into a "conspiracy against the world at large" is too ridiculous to deserve refutation. Such a conspiracy would closely resemble Mrs. Partington's single-handed contest with the Atlantic ocean. Such childish remarks make the decision of Cousins *vs.* Smith of no value, except as showing the crude notions of trade entertained by some eminent judges as late as 1807. Lord Campbell, in his life of Lord Eldon, remarks that this decision was not satisfactory to Westminster Hall, and that if the question came up again, it might be overturned.[2] We will venture to prefer the later utterances of the judicial committee of the Privy Council, a high court of last resort, to the effect that "charges of engrossing or regrating" *etc.* would not meet with much countenance in these times when the true principles of trade and commerce are better and more generally understood.[3] But the case of Cousins *vs.* Smith is interesting as containing within it the germ of the modern "trust," and as showing the rude treatment which that invention received in its infancy.

Lord Kenyon, a great oracle of the common law as distinguished from equity, appears to have been as far from sound views of political economy as his more distinguished compeer on the Equity Bench (Lord Eldon). His ignorance of the principles of that science was fully displayed in Rex *vs.* Rusby.[4] Rusby was indicted for "regrating" thirty quarters of oats on

[1] Cousins *vs.* Smith, 13 Vesey, 542.

[2] Campbell's Lives of the Lord Chancellors, IX, 420 (Am. ed. 1875).

[3] Pettamberdass *vs.* Thackoorseydass, 7 Moore P. C. Cases, 239 (A.D. 1850).

[4] Peake's Nisi Prius Cases, 189 (A.D. 1800).

November 8, 1799, having bought ninety quarters on that day. The "crime" which he committed was purchasing the oats at 41 shillings per quarter, and selling on the same day thirty quarters at 43 shillings. Lord Kenyon charged the jury in the following words:

> This cause presents itself to your notice on behalf of all ranks, rich and poor, but more especially the latter. Though in a state of society some must have greater comforts and luxuries than others, yet all should have the necessaries of life; and if the poor cannot exist, in vain may the rich look for happiness and prosperity. The legislature is never so well employed as when they look to the interests of those who are at a distance from them in the ranks of society. It is their duty to do so; religion calls for it; humanity calls for it; and if there are hearts who are not awake to either of those feelings, then our interests would dictate it. The law has not been disputed; for though in an evil hour all the statutes which had been existing above a century were at one blow repealed, —

and here he dealt a vicious blow at 12 Geo. III, cap. 71, repealing some restraints on trade, —

> yet, thank God, the provisions of the common law were not destroyed. The common law, though not to be found in the written records of the realm, has long been well known. It is co-eval with civilized society itself, and was formed from time to time by the wisdom of man. Good sense did not come in with the Conquest or at any other one time, but grew and increased from time to time with the wisdom of mankind. Even amongst the laws of the Saxons are to be found many wise provisions against forestalling and offences of this kind, and those laws laid the foundation of our common law. That it remains an offence, nobody has controverted. . . . Speculation has said that the fear of such an offence is ridiculous, and a very learned man, a good writer, has said you might as well fear witchcraft. *I wish Dr. Adam Smith had lived to hear the evidence of to-day*, and then he would have seen whether such an offence exists and whether it is to be dreaded. If he had been told that cattle and corn were brought to market, and then bought by a man whose purse happened to be longer than his neighbor's, so that the poor man who walks the streets and earns his daily bread by his daily labor could get none but through his hands and at the price he chose to demand; that it had been raised threepence, sixpence, ninepence and more per quarter on the same day; would he have said there was no danger from such an offence?

Then he had his fling at Adam Smith and in the same breath complimented the jury:

We are not monks and recluses, but come from a class in society that, I hope and believe, gives us opportunities of seeing as much of the world, and that has as much virtue amongst its members as any other, however elevated.

He then closed by quoting a public rumor:

It has been said that in one county, I will not name it, a rich man has placed his emissaries to buy up all the butter coming to the market; if such a fact does exist, and the poor of that neighborhood cannot get the necessaries of life, the event of your verdict may be highly useful to the public.[1]

When one reads this shocking tirade, one can well believe the reporter that the jury found the defendant guilty. The wealthy offender who so deeply excited the wrath of the Lord Chief Justice had only sold 250 bushels of oats at a profit of six cents a bushel. How would one of our produce exchanges relish the information that regrating (buying to sell again) is a common-law crime, and what would its members think of the magnitude of the transaction which elicited such a startling judicial charge?

Rusby, though convicted and heavily sentenced, did not actually suffer, since the appellate court was equally divided in opinion as to whether regrating was a common-law offence. Judicial opinion could not, however, long stem the tide which was setting irresistibly in opposition to legal restraints upon trade. Sidney Smith says that ten judges out of twelve at this time laid down similar doctrines in their charges to the various grand juries on their circuits. Rusby was convicted in 1799. Sound principles triumphed in 1844, when Parliament repealed all laws against "badgering, engrossing, forestalling and regrating," including any rules of the common law. The phraseology of the first section at its close is very emphatic. It declares that

after the passing of this act the several offences of badgering, engrossing, forestalling and regrating shall be utterly taken away and abolished, and that no proceeding shall lie either at common law or by virtue of any statute, for or by reason of the said offences or supposed offences.

[1] Rex *vs.* Rusby, Peake's Nisi Prius Cases, pp. 190–194.

It is instructive to know that this statute of 1844 (7 and 8 Vict. cap. 24) abolished by name either the whole or parts of eighteen English restrictive statutes extending from the time of Henry III to that of Edward VI, ten Scotch statutes enacted by the Scotch Parliament from 1503 to 1661, and eight acts or parts of acts passed by the Parliaments of Ireland from the time of Edward IV to that of George III. Of all these acts, and of the decisions under them, nothing remains except by way of warning that the laws of trade and commerce cannot be effectually subverted. They testify to the ignorance of Parliaments, the puerility of judges, the subservience of juries, and the sufferings of their victims, but to little more. Even the very words employed have passed out of the memory of men, for few can state the distinction between a "badger" and a "regrator," *etc.*

There is an important exception in the statute of 7 and 8 Vict. cap. 24, to which reference should be made. It is to the effect that the repealing clauses shall not apply to the offence of knowingly or fraudulently spreading or conspiring to spread false rumors with intent to enhance or decry the price of any goods or merchandise, nor to the offence of preventing or endeavoring to prevent by force or threats any goods, wares, or merchandise being brought to any fair or market, but that every such offence may be inquired of, tried and punished as if the repealing act did not exist. These acts of fraud and force are all that now remain in England of the common law of forestalling and engrossing or kindred offences, and of the statutes that have been enacted from time to time during the entire history of the nation in any and all of its Parliaments.

It remains to notice a topic in the common law of contracts concerning "restraint of trade." The meaning of this expression is, that a contract may be declared to be illegal and void because by means of the contract one of the parties has either wholly or partially restrained himself from following a trade or business. An element of public policy is assumed to be involved in the case. The parties cannot be in law judges of

their own best interests. It is perfectly lawful for a person to abandon a trade or profession and to remain idle, but he cannot legally agree with another to do so except within certain legally specified limits. A distinction is accordingly drawn between a contract in general and one in partial restraint of trade. The latter, under proper circumstances, may be upheld by the courts. Where these distinctions are recognized, the question of legality arises solely *between the parties to the contract:* on the application of one of them the court declares the contract invalid. There is a marked tendency in judicial decision to restrict the application of this doctrine and substantially to declare it untenable, though the whole theory has not yet been discarded.[1] This is shown in a remarkable degree by the very recent decision in the case of Diamond Match Co. *vs.* Roeber[2] in the New York Court of Appeals, in which the court established the rule that a contract in restraint of trade within any or all of the states or territories except Nevada and Montana was valid, and held that the question as to what is a general restraint of trade does not depend on state lines; they are not the boundaries of trade and commerce, and a restraint is not necessarily general which embraces an entire state. It was further decided that the *motive* for the restraining agreement is not a test of its validity, since one may legally enter into such a contract for the very purpose of preventing competition. As the law now stands, in England and New York, the restraining agreement is valid if it furnishes a fair protection to one of the parties and is reasonable. The phrase "partial restraint of trade" has grown more and more elastic, for it is difficult to imagine any restraint much more general than that embracing all of the states and territories except Nevada and Montana, these not being commercial states. It is quite plain from the opinions of the judges in these recent cases that the old rule concerning contracts in restraint of trade is deemed to be antiquated and out of touch with the most enlightened views of trade and commerce.

[1] Rousillon *vs.* Rousillon, L. R. 14 Ch. Division, 351; Printing Company *vs.* Sampson, L. R. 19 Eq. Cases, 462.

[2] 106 N. Y. 473.

The decision in Diamond Match Co. *vs.* Roeber seems to have a considerable bearing upon a clause quite likely to be inserted in a "trust" agreement between several producing establishments, to the effect that the trustees may control the production of one or more of them, even so far as to direct that they temporarily refrain from further production. Such a clause would seem to be in its essential elements a restraint upon trade. It is true that the court says, in the course of its reasoning in that case, "that combinations between producers to limit production and to enhance prices are or may be unlawful, but they stand on a different footing." This statement was no doubt intended to cover the case where there was an intent to enhance prices, and cannot be reasonably applied to combinations where the purpose is innocent, for example, to keep the supply steady and adequate to the public wants, and to avoid overproduction. In such cases the principle enunciated in Diamond Match Co. *vs.* Roeber would seem to be applicable: the restraint would be partial because limited in point of time. But the decisive point is that (as will be shown hereafter) persons constituting a "trust" become partners. They do not stand at arm's length, but hold mutual relations of confidence. In such a case, the rules governing contracts in restraint of trade are not applicable. As Lord Abinger says, in Wallis *vs.* Day:[1] "In partnership agreements, nothing is more common than to stipulate that neither party shall carry on trade except as a partner." Their relations as between themselves should be governed by the rule announced in 106 N. Y. 442, which is that courts should favor the utmost freedom of contract within the law, and require that business transactions should not be trammelled by unnecessary restrictions.

The case of Wickens *vs.* Evans[2] bears strongly upon the right of various producers to enter into reciprocal agreements to prevent competition. In that case it appeared that there were three men who separately followed the business of manufacturing trunks and boxes and who sold them by the aid of

[1] 2 Meeson & Welsby, 279.

[2] 3 Younge & Jervis (Eng. Exchequer R.) 318.

commercial travellers in various parts of England. Finding that they were subjected to losses from unrestricted competition among themselves, they entered into an agreement for dividing the territory over which they had travelled into separate and distinct districts, which should be allotted separately to each without interference by the others. The districts were marked on a map, and the allotment was to continue during their joint lives. There were clauses that neither of them would allow any goods to be manufactured at his works to be sent, or allow them in any way to be sent from his shops into the territory allotted to any other, and that neither of them would buy certain chests at a higher price than a sum named in the agreement, the intention being that each should have his territory to vend his goods in free from all hindrance, direct or indirect, from the other. It was argued against the validity of this agreement that it created a monopoly ; to which the conclusive answer was that every other box-maker was at liberty to carry on business in any of the districts to which the contract was referrible, and this view the court acceded to,[1] and the contract was upheld.

On similar grounds, an agreement to equalize the business between various producers at a particular port has been maintained. Such a principle was applied to a case where four master stevedores divided up by agreement the business of specified merchants among themselves, with a provision that if the merchant set down to one did not choose to employ him but did employ one of the other four, that one should perform the service required and at the same time render to the one passed over an equivalent.[2]

The following conclusions may now be stated as a basis for the further consideration of "trusts" as applicable to agreements between shareholders of corporations :

(1) It is quite doubtful whether, at the common law, the acts characterized as forestalling, regrating or engrossing were criminal offences, unless they concerned the necessaries of life.

[1] *Ibid.* pp. 329, 330.

[2] Collins *vs.* Locke, L. R. 4 App. Cases, 674.

The sounder opinion seems to be that these offences, with the exception named, were statutory crimes, made so in the reign of King Edward the Sixth.

(2) If forestalling was criminal at common law, it was only so where there was alleged and proved to be a criminal intent to injure trade, as by spreading false rumors or by combinations to enhance prices and the like. The intent, however, may be inferred from acts clearly pointing to it. But where the purpose of those charged with alleged criminal acts of this kind is laudable, as for example to regulate prices and keep them steady, no criminal intent can be inferred, and no crime is committed.

(3) The statute of 5 and 6 Edward VI was based upon false views of political economy and unnecessarily interfered with trade. It had no permanent influence upon the law, and since its repeal the common law against forestalling, *etc.*, so far as it existed, has fallen practically into disuse, sounder views of political economy having come to prevail in the courts.

This branch of the law, so far as it existed in England, was abolished by the statute 7 and 8 Vict. cap. 24.

(4) It is not a nuisance at common law for persons, no matter how many, to agree to form an unincorporated association and to issue certificates of shares representing property contributed, nor to make the certificates transferable either by written assignment or by delivery, nor to establish a committee having power to make rules for the government of the association. Persons doing these acts do not usurp the functions of a corporation, for the great and distinguishing feature of a corporation is the possession of such juristic qualities as to be a new legal person, distinct from the individuals forming it. To usurp the functions of a corporation, there must be the usurpation of the qualities of a "person," as for example to sue or to be sued in an assumed corporate name.

(5) The old rules of the common law declaring a contract made in general restraint of trade to be void as between the parties were based on erroneous views of political economy, have practically disappeared in great trade centres, *e.g.* in Eng-

land and New York, and are likely to be much modified elsewhere. The prevailing view in leading courts as well as in scientific circles is that the utmost freedom should be left to producers and traders in making contracts of a reasonable nature (as between the parties) concerning trade and commerce, even where the object of the contract in question is to prevent competition between the parties to it.

We now proceed to consider the application of these principles to "trusts" as we find them existing in this country.

For the purpose of a clear understanding of the subject, a well-known "trust" deed is subjoined,[1] which may be taken as a representative instrument. It is that of the Sugar Refineries company, which has been under investigation by a committee

[1] DEED.

THE SUGAR REFINERIES COMPANY.

The undersigned, namely:

Havemeyers & Elder, The DeCastro and Donner Sugar Refining Company, F. O. Matthiessen & Weichers' Sugar Refining Company, Havemeyer Sugar Refining Company, Brooklyn Sugar Refining Company, the firm of Dick & Meyer, the firm of Moller, Sierck & Company, North River Sugar Refining Company, the firm of Oxnard Brothers, the Standard Sugar Refinery, the Bay State Sugar Refinery, the Boston Sugar Refining Company, the Continental Sugar Refinery and the Revere Sugar Refinery, for the purpose of forming the board hereinafter provided for and for other purposes hereinafter set forth, enter into the following agreement:

NAME.

The board herein provided for shall be designated by the name of The Sugar Refineries Company.

OBJECTS.

The objects of this agreement are:

1. To promote economy of administration and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with a reasonable profit.

2. To give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar.

3. To furnish protection against unlawful combinations of labor.

4. To protect against inducements to lower the standard of refined sugars.

5. Generally to promote the interests of the parties hereto in all lawful and suitable ways.

BOARD.

The parties hereto who are not corporations shall become such before this deed takes effect.

of the New York Senate. The deed is taken from the printed report of the committee.

The principal points in this deed are: (1) the objects; (2) the agreement that corporate shares shall be surrendered to a board of eleven persons having specified powers; (3) the plan that the several corporations shall maintain their separate organiza-

Each corporation subscribing hereto agrees and the parties hereto who are not corporations agree as to the corporations which they are to form, that all the shares of the capital stock of all such corporations shall be transferred to a board consisting of eleven persons, which may be increased to thirteen by vote of the majority of the members of the entire board, the two additional members to belong respectively to the first and second classes hereinafter provided for.

Any member of the board may be removed by vote of two-thirds of the members of the entire board, in case of incapacity or neglect, or refusal to serve.

Any member may resign by filing written notice of his resignation with the secretary of said board.

Vacancies during the term of office of members shall be filled by appointment, by vote of the majority of the members of the entire board.

A member appointed to fill a vacancy shall hold office until the expiration of the term of the member in whose place he is appointed, which new appointee shall succeed to all the rights, duties and obligations of his predecessor under this deed.

Vacancies by expiration of office shall be filled at the annual meeting of the holders of certificates herein provided for, or at such other times as shall be prescribed by the board.

Such annual meetings shall be held in the city of New York in the month of June, and notice shall be given to each certificate holder of record, of every meeting of certificate holders, by mailing to him at least seven days before said meeting, a notice of the time, place and objects of such meeting. Holders of certificates shall vote according to the number of shares for which they hold certificates. They may vote by proxy.

The board may make by-laws. All arrangements for meetings, elections, and all details not herein specifically provided for, shall be made by the board. A member of the board may act by proxy for any other member with like effect as if he were present and acting.

A majority of the members of the board shall constitute a quorum for the transaction of business. The action of a board meeting, by a majority vote of such meeting, shall have the same effect as the unanimous action of the board, except as herein otherwise provided, and that to authorize the appropriation of money, bonds or shares, shall require the assent either written or expressed by vote, at a board meeting, of at least a majority of the members of the entire board.

No member of the board shall, during the time that he holds office, buy or sell sugar, or be interested directly or indirectly in the purchase or sale of sugar, whether for the purpose of speculation or otherwise, without a vote of a majority of the members of the entire board. For any violation of this provision, he may be removed as a member of the board and shall be liable to account for profits which shall be realized by him to the board for the *pro rata* benefit of the certificate holders.

As it is desirable that the board shall consist of members who are largely inter-

tions and each carry on and conduct its own business; (4) that the stockholders surrendering their stock shall receive certificates signed by the board, instead of retaining certificates of stock in their respective corporations. Uniformity of board certificates takes the place of diversity of stock certificates. As a matter of form the "board certificates" are issued to each

ested in the properties and the business contemplated, it is hereby agreed that all members of the board shall be free to join in or become parties to agreements and transactions which the several boards of directors, hereinafter referred to, or this board, may arrange, to the same extent and in the same manner, and with the like effect, as if they were not members of the board.

The said board may transfer, from time to time, to such persons as it may be desired to constitute trustees or directors or other officers or corporations, so many of the shares as may be necessary for that purpose, to be held by them subject to the provisions of this instrument. Such transfers may be executed by the president and treasurer of the board, in behalf of and as attorneys of the board, for that purpose and to be re-transferred when so requested by the board.

The first board shall consist of the persons hereinafter mentioned. They shall hold office as follows, and until their successors shall be elected:

Members of the First Class.

Harry O. Havemeyer, F. O. Matthiessen, John E. Searles, Jr., Julius A. Stursberg, to hold office seven years.

Members of the Second Class.

Theodore A. Havemeyer, Joseph B. Thomas, John Jurgensen; Hector C. Havemeyer withdrew and Mr. Parsons substituted, to hold office five years.

Members of the Third Class.

Charles H. Senff, William Dick, to hold office three years.

At the expiration of the terms of the third class, and of each successive class, their successors, as members of such class, shall be elected for seven years.

OFFICERS.

The board shall appoint from its members a president, vice-president and treasurer, and it shall also appoint a secretary, who may or may not be a member of the board. The board may, from time to time, create other offices and appoint the persons to fill them. It may appoint committees. It shall designate the duties and prescribe the powers of the several officers and committees.

PLAN.

The several corporations, parties to this agreement, shall maintain their separate organization, and each shall carry on and conduct its own business.

The capital stock of each corporation shall be transferred to the board, and in lieu of the same, certificates not exceeding fifty millions of dollars, divided into five hundred thousand shares, each of one hundred dollars, shall be issued by the board and distributed as hereinafter provided.

corporation in a fixed proportion. It is made the duty of the corporation receiving the certificates to distribute them among the stockholders making surrenders in the proportion that each one's stock bears to the capital of the company. (5) The profits of each company are to be made over by it in the form of dividends to the board, who are to distribute them proportionately

The certificate shall be in the following form:

No..... Shares.

Shares One Hundred Dollars Each.

THE SUGAR REFINERIES COMPANY.

This is to certify that.....is entitled to..... shares of the Sugar Refineries Company.

This certificate is issued under and subject to the provisions of a deed dated the sixteenth day of August, one thousand eight hundred and eighty-seven.

The shares represented by this certificate are transferable by the holder and his personal representatives in person or by attorney, upon the books of the board, and not otherwise, and only upon the surrender of this certificate.

They entitle the holder to the rights and are subject to the provisions mentioned in the deed.

The interest of the holder is in the proportion of the number of shares represented by this certificate to the entire number of shares outstanding. The total amount represented by outstanding certificates, and the terms of the deed may be changed from time to time by a majority in interest as therein provided.

[L. S.] In witness whereof the board has caused this certificate to be signed by its president and treasurer, and the seal of the board to be affixed hereto, the.....day of....., one thousand eight hundred and eighty.....

For value received,.....do hereby assign, transfer and set over unto..... shares of those represented by the within certificate, and....do hereby constitute and appoint.....attorney, irrevocable, for..... and in.....name and stead, to transfer the said shares upon the books kept for the purpose under the direction of the within board.

The assignee by accepting this transfer assents to the terms of the deed referred to in the certificate as the same shall be changed from time to time.

Witness.....hand and seal this.....day of....., one thousand eight hundred and eighty.....

TITLE.

The shares of the capital stock of the several corporations to be transferred to the board as herein provided shall be transferred to the names of the members of the board as trustees, to be held by them and by their successors as members of the board strictly as joint tenants.

By the death, resignation or removal of any member of the board the whole title shall remain in the others. All members ceasing to be such shall execute such instruments as may be necessary, if any, to keep the title vested in the persons who from time to time shall be members of the board.

among the holders of the board certificates. In this way, the stockholders of a company making no profit will receive a share of the profits of other companies, should any be made. (6) As a result of the whole proceeding, if fully carried out, the board becomes the holder of all the stock certificates of the companies embraced within the agreement, at the same time being

The board shall hold the stock transferred to it with all the rights and powers incident to stockholders in the several corporations and subject only to the purposes set forth in this deed.

DIVISION OF INTEREST.

The several corporations shall be entitled to the shares in the following proportions of the fifty millions of dollars, *viz.*:

[Here follow the names of the several corporations.]

Each refinery and the corporation to which it belongs shall be freed from liability and indebtedness by the parties interested in it; or such parties, if the board shall approve, may provide in cash for such indebtedness or liability, leaving the same to stand at the pleasure of the board; except that the employés' contracts shown in the schedules hereto annexed, and the contracts with Havemeyer and Elder, the F. O. Matthiesen and Weichers Sugar Refining Company and the Bay State Sugar Refinery pending for improvements and enlargements, shall continue as liabilities.

Annexed hereto are schedules in general terms of the properties of the several refineries. The properties are guaranteed to correspond with the schedules by the parties interested therein, who are to make good any deficiency. On the complete execution of this agreement each of the parties shall make a full inventory of the property not embraced in such schedules and useful for the conduct of the business, on hand or contracted for, including raw and refined sugars, molasses, sugars in process, syrups, bone black, fuel barrels, packages, charcoal and other supplies, and such inventory is to be examined and the articles appraised at their present cash value (except as to sugar and molasses to arrive, which are to be appraised at their market value on arrival) by a committee of five persons as follows: Theodore A. Havemeyer, F. O. Matthiessen, Julius A. Stursberg, John E. Searles, Jr., and Joseph B. Thomas.

The value of such property as fixed by four-fifths of the appraisers shall be paid for in cash by the said board to the treasurer of each corporation.

Bone black may at the option of the board be paid for in cash or in the bonds hereinafter provided for, or in certificates at a rate for bonds or certificates to be fixed by a vote of a majority of the members of the entire board.

The property shall remain with the refinery where it is, to be used by it, except as such refinery shall make a different disposition of it.

In consideration of the transfers of their stock to the board, the said board shall also pay to Havemeyers & Elder the sum of ....., to the F. O. Matthiessen & Weichers Sugar Refining Company the sum of ....., and to the Bay State Refining Company the sum of ....., on account of payments already made on pending contracts for improvements and enlargements.

Additional shares to the amount of $400,000, less fifteen per cent, to be left with the board as hereinafter provided, shall be received by Moller, Sierck & Co., for im-

charged with a *trust* in favor of the former stockholder or his assignee as set forth in the certificate which refers to the provisions of the trust deed.

It will be assumed without discussion that the objects to be accomplished by the arrangement are truly set forth in the deed and that they are in all respects lawful objects to be pursued,

provements and enlargements of capacity of their refinery now in progress, when said improvements are completed, and the increased capacity demonstrated.

The shares assigned to the several refineries shall be distributed by them to and among the parties interested therein.

Each holder of stock in a refinery company shall be entitled to so many of the shares allotted to such refinery as shall be in proportion of his stock to the capital of his company.

Shares for stockholders of any refinery company who shall not surrender their stock, may, under the direction of the board, be deposited for their account with the right to receive the same upon the surrender of their stock.

Of the shares allotted to the several refineries they shall leave fifteen per cent with the board, and those shares and any shares not allotted of the fifty millions of dollars, except as herein otherwise provided, shall be subject to be disposed of by the board, either for the acquisition of other refineries to become parties to this deed, payment for additional capacity, or by appropriations to the several refineries.

But in no case shall any appropriation be made to or any action be taken by any corporation without the approval of its board of directors, and no action shall be taken by the board which shall create liability by it or by its members.

PROFITS.

The profits arising from the business of each corporation shall be paid over by it to the board hereby created, and the aggregate of said profits, or such amount as may be designated for dividends shall be proportionately distributed by said board, at such times as it may determine, to the holders of the certificates issued by said board for capital stock as hereinbefore provided.

FISCAL ARRANGEMENTS.

The funds necessary to enable the said board to make the payments herein provided to be made by it, may be raised by mortgage to be made by the corporations or either, any or all of them on their property, and by such other means as shall be satisfactory to such board.

In case any mortgage shall be laid on the property of any corporation by its directors or stockholders the holders of certificates shall, within a time to be fixed by said board, have the right at such uniform rates as said board shall arrange, to have the bonds, certificates or other evidence of debts or interest in proportion to their respective holdings. Any parts which shall not be thus taken may be disposed of by said board.

CHANGES.

The number of shares and the total amount thereof, issuable by said board, may, from time to time, be increased or diminished by deed executed by a majority in value of the certificate holders.

and that the only inquiry is whether proper and lawful means have been resorted to by the various parties who have signed the deed. A variety of legal questions may arise under such an instrument. In this paper, no attempt will be made to discuss any but those which grow out of the trust between the stockholders of the corporations and the board or committee, with a view to ascertaining whether they are in accordance with law. The terms of the agreement are complicated. They might be made much more simple and the general purpose of the stockholders still be attained.

Before entering upon the discussion of our topic as thus limited, it may be well to say that there is not in the law of New York any legislation concerning trusts in general which prevents trusts of this kind. The law of that state defining the number of express trusts is solely applicable to real estate.

The provisions of this deed may from time to time be changed by deed executed by not less than a majority in interest of the certificate holders, provided no change shall be made which shall discriminate to the disadvantage of the certificate holders as between themselves.

ACQUISITION OF OTHER REFINERIES.

The capital stock of other sugar refining companies and of companies whose business relates directly or indirectly to sugar refining (in every instance to be incorporated) may be transferred to said board with the consent of a majority thereof at valuations and upon terms satisfactory to it to be held by said board under and subject to all the terms of this deed, and certificates may be issued therefor by said board and may be sold by it to provide funds for such purchase or purchases, and any such corporation or corporations shall thereupon become a party to this deed upon causing the same to be duly signed in its behalf.

CUSTODY OF DEED.

This deed, when executed by the parties hereto, shall be delivered to the president of the board, who shall have the sole and independent custody and control of the same, and the said deed shall not be shown or delivered to any person or persons whatsoever except by the express direction and order of the board.

A copy of the said deed shall be lodged with a member of the board residing in Boston, Massachusetts, which shall be held by him under the same conditions and in the same manner as the original deed.

In witness whereof the parties have hereto set their seals and affixed their names, these presents to become binding when completely executed by all the parties, and to take effect from October 1st, 1887.

Dated August 16th, 1887. [Here follow signatures.]

Report of the Committee ..... on the Investigation relative to Trusts. Transmitted to the Legislature, March 6, 1888. [Senate, No. 50.] Pages 644–651.

Trusts of corporate stock concern personal property and are beyond the purview of that legislation. This is probably true of a number of the other statutes referred to in the *Harvard Law Review*.[1]

One general fact, running through the trusts against which an outcry has recently been made, is that the producers of certain commodities are corporations, having power by law to have a subscribed capital in shares and to issue transferable certificates of stock to the subscribers. This course having been taken by the corporations respectively, the *subscribers* or stockholders of a number of such corporations enter into an agreement between themselves whereby, among other things, they transfer to a committee their certificates of corporate shares. This committee take out from each corporation new certificates of shares in their own names, and thereupon issue in return to the old stockholders certificates *of their own* and not of the corporation. The result of this is that the committee become the stockholders on the corporate books and have the same power of control as the stockholders would have had if they had retained their position as stockholders. This course of action, if it had been taken to effectuate a transfer of ownership as the result of a sale, would have been one of the ordinary transactions connected with the transfer of stock, except that no certificate would have been issued by the new to the former owner. The reason for the difference is that in the so-called "trust" the stockholder does not intend, in making the transfer to the committee, to part with his ownership, but rather to confer a power of control for the stockholder's ultimate benefit. It would be impossible to persuade any stockholder in his right mind to take such a course unless he supposed that it would be likely to be beneficial to himself. And if the main body of stockholders concur it must be assumed to be in their view for the general benefit. Nothing is more certain than the proposition that every stockholder has a right in law to put his stock in this way in the name of a trustee, provided that the *purpose* be lawful. There is nothing in law to prevent each stockholder

[1] Vol. I, p. 136.

from selecting the same trustee or trustees, and designating the same purpose. There is nothing in the existing law of personal property requiring the purpose (which is technically called a "declaration of trust") to be in writing, though there is such a rule as to trusts in real estate. Still, it may as to personal property be put in writing, and prudence would require that it should be. Accordingly, it is reasonable to suppose that, in such great transactions as are now under consideration, the stockholders will not surrender their certificates to the committee without a written agreement defining the powers of such committee and the purposes for which the transfer is made. Such an agreement "declares" the trust. It thus appears that a trust is in itself a colorless thing. It is a legal contrivance in daily use. It has in itself no element of good or bad. It is the purpose, if anything, which gives it the stamp of illegality.

We are thus led to the conclusion that we have before us the very problem that we would have if individuals, not stockholders or members of incorporated companies, were doing the acts in question, and all the questions that have already been discussed become pertinent to the present inquiry. It may, however, properly be pointed out, for the sake of insuring still greater clearness, that the corporations in which the shareholders have stock are not parties in any form whatever to the trust as between the stockholders and the committee. The stockholders cannot in law be confounded with the corporations. The latter still remain in existence. The agreements between the stockholders may be modified or abrogated. The corporations in each case are untouched. They may carry on their business as before, earn profits, or remain idle and earn none. Whatever moral force the agreement of the stockholders may have upon the corporation, it has no direct legal effect. If the corporate directors should refuse to pay attention to the wishes of the stockholders, nothing could be accomplished by the latter until, at the annual election, they proceeded to choose more complaisant directors.

It will be necessary, at this stage of the investigation, to consider more closely the exact interest which a stockholder in a corporation has in its property and business.

Owing to the settled rule that a corporation is a distinct legal person, the stockholders do not own its property in a strict sense, but at most have a certain interest in it of an equitable nature. This interest is in the nature of a right of action in an appropriate court of justice, being termed a "thing in action." Accordingly, if the corporation owns land, the stockholders do not have any ownership of the real estate, but their right of action is deemed to be personal property, as it is in every other supposable instance. The ownership of stock confers upon the owner the following principal rights: (*a*) to vote for managers or directors at an election; (*b*) to receive dividends, if declared; and (*c*) to hold the corporation or directors to account for the management of its affairs in a court of justice. When the corporation is dissolved, the property remaining after payment of debts may vest in the stockholders; but while the corporation continues to exist, it in a proper sense belongs to the corporation, so that the interest of the stockholders is theoretically incorporeal, and their rights as between themselves and the corporation are worked out by a court of equity on the footing of a trust. The stock certificates issued to them are but the symbols of the rights which grow out of the relation existing between the corporation and its stockholders — rights which would arise even though no certificates were ever issued. Grouping together the various rights of stockholders as evidenced by the usual certificates, they may be termed "equitable" rights as distinguished from the rights of the corporation itself, which may be termed "legal" rights. The point of inquiry then is: Can a portion or all of the stockholders of a number of corporations unite and contribute their equitable rights as stockholders to the formation of an unincorporated association, with a view to bringing into a compound fund the profits which might accrue to them as dividends and sharing among themselves, according to some fixed rule, the profits as well as the losses of all the corporations, and so wield their voting power as to make their arrangement potential and permanent? Two questions spring out of this inquiry. One is, whether such an arrangement would be a

partnership; and the other, whether such a partnership, if there be one, is lawful.

Let us take, for example, the sugar trust. There is not the least reason for holding the sugar trust to be a corporation. It is simply a voluntary unincorporated association, in which the stockholders of various corporations engaged in the manufacture of sugar contribute their stock shares and agree to share the profits of the manufacturers on all the shares when placed in a common fund, agreeing indirectly also to share the losses naturally falling upon stockholders in other companies in which no profits are made. The fact must be kept steadily in view that the profits go into a common fund, and the common fund is divided up among the stockholders of various companies signing the sugar trust agreement. It will be contended in the present discussion that this constitutes an association in the nature of a partnership. The grand element in a partnership is that something shall be attempted with a view to gain and that the gain shall be shared by the parties to the agreement. Another common form of statement is that there must be an agreement to share "profits." This word does not mean gross returns but net profits; and this element appears to be present in a trust agreement, for the various shares are brought together as property with a view that there shall be such a management as to make profit and that the profit shall be divided among all the contracting parties. Perhaps the subject will be made more clear by a concrete illustration. Let us suppose that there are four or five private individuals separately manufacturing a commodity within a limited district, in competition so close as to forbid any profit. These manufacturers finally enter into an agreement that they will create a committee to decide which of the establishments shall cease running and of course make no profit, and that the net profits realized by the others shall be paid into a common fund held by the committee and divided among *all* the manufacturers. This arrangement would apparently be a partnership among all, as the act of one or more in consenting to be idle would be as necessary an element in obtaining a profit as the act of others in continuing to make profit.

It may be well, at this point, to ascertain whether there is any "consideration" for such an agreement. It is a perfectly well understood rule of the common law that a promise without a consideration is nugatory and void. The consideration is, however, ample in the case supposed. It may consist in the mutual promises to form the partnership, each promise being the consideration for the other. Again, a consideration may be sought in the consent of the shareholders of a particular company that their establishment may be idle, it being a settled rule that a consideration may be derived not only from a benefit to be received under the agreement by the promisor, but also from a loss or inconvenience to be sustained by the promisee.

The fact that the stock, in the case of a "trust," does not stand in the name of the stockholders but in that of the trustees is not material in this part of the discussion. The original stockholders have given up their formal ownership to accomplish the purpose designed to be carried out in the trust agreement. Should that fail to be carried out, they have a right to their stock again. Their position during the existence of the trust resembles that of beneficiaries of the estate of a deceased person when the executors are carrying on partnership business with the funds of the estate by the direction of the testator.

Let us state this last matter more fully. Assume that A, B, C and D were separately and individually engaged in the manufacture of sugar in a circumscribed district. Each is dead, and has in his will directed his executors to carry on the business for the benefit of his heirs and next of kin, who are of full age. The proprietors of the various establishments find themselves suffering from ruinous competition. The beneficiaries in each estate sign an agreement authorizing co-operation between the various establishments in the general manner of a so-called trust. This case comes very close to the agreement between stockholders in a number of corporations, since the beneficiaries in each estate do not have the legal title to the capital employed, but only an equitable interest.

It is well settled that executors carrying on a business in this

way may become liable as partners, even though they derive no pecuniary benefit from the transaction. It is enough that they receive the profits or a share of them, even if they do so not for their own benefit but solely for the purpose of making them over to the beneficiaries whom they represent. The assent of the beneficiaries may also bind them as equitable partners, though that would not relieve the executors as between themselves and third persons who have claims against them as partners.[1]

On similar principles, it would follow that the trustees in the trusts now under discussion, having the right to deal with the interests of stockholders in various corporations so as to obtain and share profits, would be to that extent, partners. This view is sustained by the case of Brett *vs.* Beckwith.[2] Two underwriters separately and distinctly insured risks on a marine insurance policy and agreed as between themselves to share the risks, paying or receiving sums according to the results of the accounts. This arrangement made them partners. It is not necessary that the agreement should contain the word partnership or its equivalent.[3]

The result therefore would seem to be that a "trust," no matter how large may be the interests that it controls, is but a partnership, and that its validity will depend, like that of ordinary partnerships, upon the purpose sought to be accomplished.

It will now be necessary to consider and reconcile some cases which may, at first blush, seem to be opposed to this view. It is stated in a note to the thirteenth edition of Kent's Commentaries that

> arrangements for pooling profits, that is, for putting the net profits of different concerns together at the end of a certain time and dividing them in a certain proportion irrespective of the amounts contributed, have been held not to create partnerships.

The reason for this rule is subjoined in the following terms:

[1] Wightman *vs.* Townroe, 1 M. and S. 412; *Ex parte* Garland, 10 Vesey, 119.

[2] 3 Jurist N. S. 31.

[3] Lindley on Partnership, p. 12; Greenham *vs.* Gray, 4 Irish Com. Law, 501; Marsh *vs.* Russell, 66 N. Y. 288.

And this seems to be explained by the modern English doctrines on the ground that the several parties continue to carry on the business on their own behalf alone, although they have bound themselves to pay over a part of what they make.[1]

Assuming that the rule concerning "pooling profits" as thus stated is sound, it manifestly does not include "trusts," since the several parties do not, in the words of the annotator, afterwards "continue to carry on the business *in their own behalf alone.*" The agreement binds one or more of them not to carry on the business at all if the best interests of the associated parties taken as a whole seem to require that course, and yet they participate in the profits of those who do carry on business. There is thus, as far as the stockholders are concerned, a joint control exercised over each separate manufactory, and such a community of interest is inconsistent with completely separate management. A very well reasoned case in the New York reports, that of Champion *vs.* Bostwick,[2] shows the real principle and the rule to be derived from it. The opinion on the appeal discloses the ground of the decision. The facts were, in substance, that A, B and C ran a line of stage coaches from Utica to Rochester, New York, and the route was divided between them into sections, the occupant of each section furnishing his own carriages and horses and paying the expenses of his own section. The money received from passengers, after paying out of it the turnpike tolls over the whole route, was divided among the parties in proportion to the number of miles run by each. This arrangement was held to constitute a partnership. Stress was laid upon the fact that the passage money constituted a *common fund* out of which the tolls were first to be paid, and the residue was to be divided according to the number of miles run by each. This, of course, would not necessarily be the equivalent of the amount earned by any occupant upon his section. Some passengers might travel only on one section; another section might include the travel of a large city. Whatever any one

[1] Kent's Commentaries, 13th ed., vol. 3, p. 25, note 1.

[2] 11 Wendell, 57; S. C. on Appeal, 18 *Id.* 175 (A.D. 1837).

received was a proportionate share of the profits considered as a whole. This case has never been judicially weakened, though it came up for explanation in 1859 in the case of Merrick *vs.* Gordon.[1] In this last case, the agreement between the alleged partners embraced only the division of the freight on goods transported over the lines of both of them to and from specified points; as if, for example, A's line extending from New York to Poughkeepsie and B's line from Poughkeepsie to Albany, the division of the freight over the whole line was made between A and B in fixed proportions. It was decided that this arrangement did not constitute a partnership, as no common fund was created. At the same time, the authority of Champion *vs.* Bostwick was fully recognized.[2] It may accordingly be said that wherever the profits are to become a common fund and various distinct producers have an interest in the fund before any division of profits, a partnership is created.[3]

Assuming that a partnership exists between the various producers in a "trust," their power to make an agreement to prevent competition between themselves cannot be denied unless it is in some way unlawful *in its own nature.* This has appeared in the course of this discussion, and the results reached may be briefly stated: (1) Such an agreement cannot be criminal at common law without a bad intent, such as to raise prices unduly. It is not wrong at common law to raise prices so as to pay the cost of production with a reasonable profit, nor under the same circumstances to regulate them and keep them steady. (2) Such an agreement cannot be treated as a criminal act under a statute declaring it to be criminal conspiracy for two or more persons to conspire to "commit an act injurious to trade or commerce,"[4]

[1] 20 N. Y. 93. [2] *Ibid.* p. 95.

[3] The case of Champion *vs.* Bostwick has been approved in the late cases of Burnett *vs.* Snyder, 81 N. Y. 555; Strober *vs.* Elting, 97 *Id.* 102; Ontario Bank *vs.* Hennessey, 48 *Id.* 55. Some cases which have been assumed at times to be in conflict with Champion *vs.* Bostwick are not really so, since there was no community of interest before the division of profits was made. They belong to the class of cases represented by Merrick *vs.* Gordon, commented upon in the text of this article. Among them are Wright *vs.* Davidson, 13 Minn. 449; Snell *vs.* DeLand, 43 Ill. 323; Smith *vs.* Wright, 5 Sandf. 113; Irvin *vs.* Railroad, 92 Ill. 100.

[4] N. Y. Penal Code, sec. 168.

since it is *not* "injurious to trade or commerce" to keep the production of a commodity on an even line with its consumption. To prevent a "glut" in the market is to do an act beneficial to trade or commerce. Nothing can show this more clearly than the history of the very commodity over which the legal contest raged in Rex *vs.* Waddington, already cited. Any one acquainted with the violent fluctuation in the price of hops within the last few years cannot fail to have been struck with the mischievous consequences of an alternation between a glut and scarcity. When a glut comes, prices drop far below the cost of production. Farmers are frightened, plough up the vines, sell the poles at a sacrifice or burn them for firewood. A large part of the capital employed in the production of the commodity wholly disappears. A year or two later, the production having been greatly lessened, prices rise rapidly and unduly. Farmers, forgetting the severe lessons of the past, soon reach anew the point of over-production; a glut again ensues with the former result. Would it be "injurious to trade or commerce" for a set of producers to enter into an agreement when prices are low to withdraw from the market the excess in order to return it again when prices are high? Such a statute, accordingly, as has been named can have no application, unless where the act done is directly calculated to injure trade or commerce and is of such a nature that it can reasonably be inferred that there was an *intent* to do the injury complained of. (3) The trust agreement is not void as an alleged restraint upon trade, and is binding as between the parties to it.

The case of Marsh *vs.* Russell[1] is of importance in this connection. A, B, C and D, expecting to enter into a contract with several towns in one of the counties of New York to fill the quota of the towns under an anticipated call of the government for volunteers, agreed between themselves to form a partnership on the basis that no volunteer should be supplied by the firm to the towns for less than five hundred dollars, and that no individual member of the firm should furnish the quota of any town for less than that sum per man without the consent

[1] 66 N. Y. 288.

of all the signers of the agreement. All gains and profits which might accrue in the business as well as losses were to be shared equally by the signers. An action having been brought for an accounting between the signers on the footing of a partnership, it was objected that the alleged partnership was on its face void as being opposed to public policy and therefore illegal. The court upheld the agreement. It conceded that the effect of the agreement was that the individual contracts of the members of the firm inured to its benefit and that no contract to furnish recruits should be made for a less sum than five hundred dollars ;[1] still, the court added, it did not appear that the parties had a monopoly of recruits, or that the towns were in any way obliged to get their recruits from them, or that the price charged was an unreasonable or unusual price, or that the parties did or could by their contract put up the price of recruits or embarrass the towns in filling their quotas; nor did it appear a necessary inference from the terms of the contract that the purpose of the parties was an improper or unlawful one or that its effect would be to thwart the policy of any law or to injure or jeopardize any public interest. It was further held that the business of furnishing recruits was a lawful one and could be carried on by individuals or firms; and that when carried on by a firm its members could regulate the price at which they would buy and sell, as they could if they had been dealers in other articles having a price. For example, if they had formed a partnership to buy or sell wheat, can it be doubted that they could lawfully agree in their articles of copartnership that neither member of the firm should come in competition with the firm and that wheat should not be purchased for more than a certain price, nor sold for less than a certain other price? Such an agreement would certainly not upon its face be unlawful and could only be condemned by proof that it was a part of a conspiracy to control prices or create a monopoly or that it was made for some other unlawful purpose." [2]

This clear and satisfactory statement of the law includes a "trust." As we have seen, it is but a great partnership, regu-

[1] *Ibid.* pp. 291, 292. [2] *Ibid.* p. 291.

lating prices and imposing obligations upon all the members of it not to interfere with its regulations. What possible difference can it make, in philosophy or law, whether in making up a partnership a group of individuals enter into the firm as a group agreeing with another group or whether all enter individually? May not A, B, C and D acting as a group of persons contract with E, F, G and H considered as another group to constitute a firm as well as if the eight persons represented had had no prior business relations with each other? If so, we have substantially a "trust," and all that is so well said in Marsh *vs.* Russell is applicable.

An additional suggestion may properly be made. In Marsh *vs.* Russell some stress is laid upon the absence of secrecy as bearing upon the lawfulness of the agreement. It would seem that this could at most be but a make-weight in connection with other objectionable elements. It is not easy to perceive why a contract between private individuals, perfectly lawful and valid if made with publicity, can be unlawful and illegal without that element. It may, however, properly be a circumstance to be taken into account when the purpose of the contract is doubtful. It may fairly be questioned whether the members of "trusts" have not pursued a mistaken policy in resisting or retarding the efforts of legislative committees in attempting to obtain information as to the nature of their agreements. Since an agreement might perhaps be so drawn as to be "injurious to trade or commerce," full publicity should be given when inquiries of this kind are instituted. It might be well that the law should require that the agreement should be registered in an appropriate public office somewhat after the manner that it directs an agreement constituting a limited partnership to be filed, or bills of sale of goods or chattel mortgages to be recorded or filed.

II.

The next inquiry is: If it be conceded that "trusts" are lawful, being legitimate modes whereby producers may regulate prices, would preventive legislation be valid, or would it be opposed to the constitutional rule that a person is "not to be

deprived of life, liberty or property without due process of law"? This clause appears both in state constitutions and in the United States constitution. The word "liberty," as here used, has been construed by the highest state authority to include "the right of a person to adopt such lawful industrial pursuit, not injurious to the community, as he may see fit." It includes the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation.[1] It is judicially declared that a liberty to adopt or follow lawful industrial pursuits in a manner not injurious to the community is not to be infringed upon, limited, weakened or destroyed by legislation. For such restrictive or destructive legislation good reasons must be given, based upon some ground affecting the public welfare. Such reasons are given for restrictions upon the sale of intoxicating liquors, for regulations conducive to the public health or other matters embraced within the elastic term "police power." But the line must be drawn somewhere; and the proper place to draw it is where the right to produce or to trade is restricted without any public advantage. A law cannot be justified simply by citing its own terms. An act does not become a nuisance by declaring it to be so. The objectionable element must exist as a matter of fact before the law is enacted to suppress it, and it must be sufficient to justify the law. Recent instances are an act prohibiting a seller from connecting with the sale of goods a gift of some advertised present, the object of the seller being to stimulate sales.[2] Another instance is a law prohibiting the manufacture of cigars and the preparation of tobacco in any form in tenement houses.[3] These and other cases show that in determining as to what is a proper exercise of the police power, an act of the legislature is not final or conclusive but is subject to the scrutiny of the courts.

The application of these authorities to the case in hand is obvious. If a "trust" entered into by a number of producers is now lawful as a reasonable and proper element in production,

[1] People *vs.* Gillson, 109 N. Y. 389, 398 with many cases cited on p. 399.
[2] People *vs.* Gillson, 109 N. Y. 389. [3] Matter of Jacobs, 98 N. Y. 98.

it cannot properly be made unlawful by legislative acts of a stigmatizing character. To produce freely as individuals; to associate and act in concert with others; to stimulate production when there is a scarcity of commodities; to regulate it and restrain it when there is a glut,—these things, whether they be done by individuals or by combined action, are prime elements in "liberty" of trade. They are also constitutional rights, and when used with a due regard to the rights of others, are beyond the reach of hostile or repressive legislation. Though corporate charters should be arbitrarily repealed, in some form the liberty of association would survive to producers.

III.

If the states cannot properly legislate upon this subject so as to suppress trusts having in them no illegal purpose, the same remark is true of Congress. The authority of Congress over such a subject is in any event limited, and confined either to foreign commerce or that "among the states." Commerce within a particular state is not within its supervision. If it should essay to make an act of producers unlawful which is in its own nature lawful, its legislation would seem to be open to the same constitutional objection, as far as internal commerce among the states is concerned, as the legislation of a state; for the same constitutional restriction governs Congress, *viz.*: that it must not deprive a person within the country of "liberty or property without due process of law." This provision has already been sufficiently commented upon.

It would almost seem, when great trade questions like this of trusts begin to agitate the public mind, that statesmen stand in awe over the probable effects of the mighty power that they and their predecessors have done so much to create. We in the United States have certainly not been outstripped by any men of any nation in removing the shackles imposed by men of former days upon domestic trade and internal commerce. At the very birth of the nation we established in our domestic trade perfect freedom throughout the country. Ever since that time

we have been developing domestic commerce on the lines indicated by our earliest statesmen. We have bridged mighty rivers, tunnelled broad mountains, traversed vast deserts, extended all forms of communication till the whole country, with all its varying local institutions and diverse economic interests, is for trade purposes a single state. Commerce and trade have overleaped state lines and have become national. Unrestrained power of production has been followed by an equally unrestrained and an equally beneficial liberty of association. The increase and growth of corporate power has been truly marvellous. The old notion of a corporate charter being a distinct gift of sovereign power, to be doled out to subjects with a sparing hand, has been practically abandoned. Corporate charters having a semblance of public benefit are granted for the asking. Ceasing to be mere privileges, they are looked on by business men as the machinery of trade and commerce and in that aspect a matter of right. But where a partnership or an unincorporated association will serve their purposes better than an incorporated company, they cannot see why they should not freely resort to machinery of that kind. They know well that, without profit, production will cease. Capital will then hide itself or be transferred to more enlightened countries where laws hampering trade have long since ceased to exist, and where freedom of internal trade means the removal of all useless clogs upon production. Forty years of legislative experience have taught the people of England that there is nothing to fear from combinations of producers when competition is absolutely free, and that no "conspiracy against the world" is possible.

Let us therefore be calm. "Trusts," as a rule, are not dangerous. They cannot overcome the law of demand and supply nor the resistless power of unlimited competition. They are, however, a sign of the times. The right of association is the child of freedom of trade. It is too late to banish it. As mercantile concerns under freedom of trade have tended in our cities to be more and more vast and comprehensive and absorb the smaller ones, so it is reasonable to suppose that the right of

association will be made more and more available in manufacturing. In fact the two tendencies are in substance the same. If association is prevented by law, different manufactories may be melted into one. The only way out of the difficulty, if it be one, is to invade the right of property, limit production by law, cut down the employment of large capitals, and perhaps, in the end, hand over production to the state.

Are we ready for these things? All English-speaking people, we of the United States and the English in England have been engaged for a hundred years both in overcoming natural obstacles to internal trade and in abrogating absurdly restrictive laws. It is not to be credited that we shall commit the supreme folly of resorting to mischievous legislation, fully tried and long since abandoned.

THEODORE W. DWIGHT.